

REGION 8 GUIDANCE FOR COMPLIANCE MONITORING, COMPLIANCE ASSISTANCE AND ENFORCEMENT PROCEDURES IN INDIAN COUNTRY

The purpose of this document is to set forth the Environmental Protection Agency (EPA) Region 8's procedures for compliance assistance and enforcement activities in Indian country.¹

GENERAL PRINCIPLES

The Federal government has a trust responsibility to federally-recognized Indian tribes that arises from treaties, statutes, executive orders² and the historical relations between the United States and Indian tribes. The Federal government's trust responsibility creates a unique legal and political relationship between the Federal government and federally-recognized Indian tribes. Consistent with this unique relationship, EPA establishes regular and meaningful consultation and collaboration with tribes on a government-to-government basis when EPA activities may affect tribal governments. In addition, EPA Region 8's primary focus will be to protect human health and the environment in "Indian country," as defined in section 1151 of title 18 of the United States Code (18 U.S.C. § 1151).

EPA has developed policies and guidance consistent with the trust responsibility and the government to government relationship with federally-recognized Indian tribes.³ Included in those policies are specific principles regarding compliance assistance measures and enforcement in Indian

¹ This guidance deals solely with violations of EPA's civil regulatory programs. It does not apply to criminal conduct, criminal investigations or enforcement pursuant to criminal provisions of laws or regulations which are enforced by EPA. This guidance also may not apply in emergency situations where there is an immediate threat to human health or the environment. In such cases, the Tribal Assistance Program (TAP) will be notified, EPA will follow this guidance to the extent practicable, and the Region will ensure prompt communication within the Region and consult with the affected Tribal government regarding all actions for which prior communication and consultation was not possible.

² See, e.g., Executive Order No. 13175 on Consultation and Coordination With Indian Tribal Governments, 65 Federal Register 67249 (November 9, 2000); Executive Memorandum on Government-to-Government Relations with Native American Tribal Governments, April 29, 1994.

³ See, e.g., EPA Policy for the Administration of Environmental Programs on Indian Reservations (1984); Indian Policy Implementation Guidance (1984); Federal, Tribal and State Roles in the Protection and Regulation of Reservations Environments (1991); Tribal Operations Action Memorandum (1994); EPA Region 8 Policy for Environmental Protection in Indian Country (1996). This guidance is intended to be read in a manner consistent with existing policies regarding EPA activities in Indian country.

country. The purpose of this document is to further elaborate on the procedural steps that should be taken when EPA discovers that a facility in Indian country is not in compliance with Federal environmental laws.

DETERMINING THE TRIBE'S CONNECTION TO THE FACILITY

Region 8's policy is to use one of two paths to address non-compliance in Indian country. If a facility (whether it is within or outside of Indian country) is owned (51% or more), managed or controlled by a Tribal government (not just by an individual Tribal member), all of the procedures outlined below (except step 4. c.) apply. If the facility is not owned, managed or controlled by the Tribal government, then only the procedures outlined in steps 1, 2, 3, and 4.c. apply, and EPA generally will address the non-compliance as we would in situations involving private facilities located outside of Indian country. EPA will also provide appropriate contact and consultation with the Tribal government, and any other specific treatment EPA decides is warranted due to other substantial interests expressed by the tribal government. Where the situation is not clear as to how to proceed (e.g., where EPA needs to determine whether the tribe has a substantial proprietary or other tribal interest), the matter will be dealt with on a case by case basis.

For tribal facilities, EPA's process is to provide reasonable and adequate compliance assistance aimed at assisting such facilities to achieve compliance with Federal environmental laws. Direct formal EPA enforcement action through the administrative or judicial processes will only be considered when EPA determines that: 1) a significant threat to human health or the environment exists; 2) such action would reasonably be expected to achieve effective results in a timely manner, and 3) the Federal government cannot utilize other alternatives to correct the problem in a timely fashion.

PROCEDURES APPLICABLE TO ALL INSPECTIONS AND NON-COMPLIANCE AT FACILITIES LOCATED IN INDIAN COUNTRY

Set forth below are the procedures for conducting inspections and responding to non-compliance at facilities in Indian country, and at tribally owned, managed or controlled facilities located outside Indian country.

1. Prior to a planned EPA inspection in Indian country (and for record review situations where non-compliance is confirmed), and consistent with the Regional Indian policy, the responsible EPA program will inform the Tribal government by letter from the Assistant Regional Administrator (ARA) for that program.⁴ If EPA knows that the facility is owned, managed or controlled by the Tribal government, it is not necessary to include the language quoted below. In all other cases, EPA will include the following language in the letter to the Tribal government (with a copy to TAP):

"During the inspection, EPA will document any non-compliance with Federal

⁴ If, in addition to the letter to the Tribal government, a program issues a standard inspection notice to the facility, the program will copy the Tribal government and TAP.

environmental laws found at this facility, and proceed with appropriate action to address the problem. [For record review situations, use the following alternate first sentence: 'EPA has documented non-compliance with Federal environmental laws at this facility, and will proceed with appropriate action to address the problem.'] EPA has no evidence to indicate that the Tribe owns, manages or controls this facility, so we may address such non-compliance by issuing an order or other administrative or judicial enforcement action, while keeping the Tribal government fully informed of our efforts and progress. This is ordinarily the fastest way to return a facility to compliance and to deter it and other facilities from violating the law in the future.

If, on the other hand, a facility is owned (51% or more) or managed or controlled by a Tribal government (this does not include ownership, management, or control by an individual Tribal member), consistent with the Federal government's trust responsibility, EPA will offer appropriate assistance to the Tribal government in the matter, prior to considering direct formal enforcement actions. EPA and the Tribal government would work together to assist the facility to achieve compliance.

Accordingly, we now ask if the Tribal government owns, manages or controls this facility and seek any other facts or information you wish to provide in writing to aid EPA in our efforts to address any non-compliance that may be found at this facility. Other information could include any tribal ownership interest (including less than 51%), substantial economic benefit the facility provides your Tribal government (but not just individuals), essential or unique services it provides the Tribal government, whether the facility is located on Tribal trust land, or any other information you would like to share. EPA will consider any such information submitted in reaching the Agency's decision as to the appropriate enforcement response at the facility.

Please mail me such information within two weeks of the date of this letter, with a copy to the Tribal Assistance Program, Region 8. If we do not receive any information from the Tribe, we will proceed as necessary, and keep the Tribal government fully informed of our actions. Thank you for your cooperation and assistance."

2. Non-compliance discovered and documented at facility.⁵
3. Region 8's Offices of Enforcement, Compliance and Environmental Justice (ECEJ) and Partnership and Regulatory Assistance (OPRA, including TAP and Water Program) inform each other of the non-compliance immediately (no later than within one week), if the non-compliance

⁵ Any inspection or visit to Indian country will follow applicable policy or guidance, including the Region 8 Indian Policy and the Tribal Q's and A's document; this includes the offer of entrance and exit interviews.

is confirmed and then would be enough to warrant EPA contact with the facility.⁶ TAP will notify the other programs in all instances of non-compliance.

4. A. If the facility is owned 51% or more by a tribal government (but not just an individual tribal member), or managed or controlled by a tribal government, proceed with step 5, below.

B. If the tribal government has provided information for EPA's consideration that TAP believes justifies some approach other than a formal enforcement action, within one week TAP will notify the Technical Enforcement Program (TEP) and, if applicable, the Water Program, and the Legal Enforcement Program (LEP) management of the situation and the alternatives that should be considered. ECEJ, OPRA, and the Office of Regional Counsel (ORC) will discuss, at the next Case Screening Committee (CSC) meeting, whether such information warrants treating the facility in some manner other than with a formal enforcement action. EPA's response may range from treating the facility as if tribally owned, managed or controlled, to treating it in a manner similar to private facilities without tribal interest. If agreement cannot be reached, the issue will be immediately sent to the ARAs for decision by them or the Regional Administrator (RA) or Deputy Regional Administrator (DRA). If, after consultation with the tribal government, EPA concludes that the information provided does not warrant any different treatment based on the claimed tribal interest, an EPA ARA will so inform the Tribal Chair or President via an explanatory letter and, if necessary, follow-up calls or meetings. EPA will then proceed as with other similar facilities outside Indian country, while fully communicating with the tribal government as required by EPA policies.

C. If the facility is owned, managed or controlled by: (1) a government other than a tribe; (2) an individual; or (3) a non-tribal corporation, partnership or other organization, and the tribal government has not provided EPA with any additional information to consider, the following steps (5. to the end) do not apply, and EPA will proceed as with other similar facilities outside Indian country, while fully communicating with the tribal government consistent with EPA policies. For such facilities, the enforcement team should consult Regional policy and TAP to ensure proper communication with the tribal government is maintained throughout the case. Once non-compliance is discovered at a privately-owned facility located in Indian country, ECEJ, (or the Water Program) will immediately notify TAP and ORC, the case will be discussed

⁶ For non-compliance at public water systems, where there is not an immediate or acute threat, further action under this guidance will be initiated as follows:

- a. for violations under the surface water treatment or total coliform rules, actions under step 5 and subsequent steps will be initiated upon the second violation within a rolling twelve month period. Upon the second violation, EPA programs may agree that further non-compliance is not likely to occur, in which case, step 9 and subsequent steps may be initiated upon the third violation within a twelve month period;
- b. for all other public water system non-compliance, further action will be initiated upon a failure to comply after a notification letter is sent to the tribal chairman and the system.

at the Case Screening Meeting, and an enforcement attorney will be assigned. At a minimum, LEP will coordinate the following: (1) ECEJ (or the Water Program) and TAP will notify the tribal government of the non-compliance (except in specific instances where the enforcement program believes sharing the information may jeopardize the enforcement investigation); (2) ECEJ (or the Water Program) and TAP will solicit and consider the opinion of the tribal government on a proposed enforcement response letter, including consideration of whether the tribal government is pursuing or planning to pursue an independent enforcement action (Attachment A is a useful sample); (3) EPA will copy the tribe on letters and inspection results that are transmitted to the regulated entities; and (4) program staff and TAP will update the tribal government contact on the progress and results of enforcement activities.

PREPARING FOR COMPLIANCE ASSISTANCE AND REGIONAL DISCUSSIONS FOR TRIBAL FACILITIES

5. Within one month (or any standard time period established by the applicable program) of the discovery of non-compliance (if the non-compliance is confirmed and then would be enough to warrant EPA contacting the facility), the applicable program will (a) research the facility's compliance and compliance assistance history, and (b) provide the history and inspection or other report in writing to TAP and ORC (and ECEJ, in the case of other programs). Attachment B provides a background and examples of compliance assistance activities and a sample compliance assistance history.

INFORMATIONAL LETTER TO TRIBE

6. The applicable program will send a draft informational letter to TAP and ORC for review within one week of the internal circulation of the final inspection or other report confirming non-compliance and compliance assistance history. The draft informational letter will contain information regarding the nature of the non-compliance, with a copy of the final inspection or other report confirming non-compliance and compliance assistance history. TAP will have one week to review and concur on the draft informational letter.⁷ Attachment C is a sample information letter.
7. The informational letter then will be sent to the Tribal Chair or President (with copies to the tribal government's environmental director and the facility manager, and enclosing an extra copy for the tribe to share with legal counsel as they see fit) from an ARA.

⁷ Regional programs commit to meeting deadlines. Substitutes for primary contacts will be used by ECEJ, OPRA and ORC for all internal Regional meetings and for internal concurrences. The substitute may be the applicable ARA without a full elevation.

8. OPRA will communicate with the Tribe at an appropriate level as a follow-up to the informational letter.⁸

DISCUSSION/DECISION ON COMPLIANCE ASSISTANCE

9. ECEJ, OPRA, and ORC will meet within two weeks of the internal distribution of the final inspection or other report and compliance assistance history. The purposes of the EPA internal meeting are to: 1) discuss the facility's compliance history and any compliance assistance that has been given; and 2) decide what type of compliance assistance is appropriate to address the current non-compliance.

If the meeting participants agree on the type and nature of compliance assistance to provide, ECEJ (or, if applicable, the Water Program) will draft a compliance assistance letter to the tribal government.

If ECEJ and OPRA cannot agree on the type and nature of compliance assistance to provide, the issue will be scheduled for decision at the next weekly CSC meeting, including OPRA and ORC. If ECEJ and OPRA still disagree on our course of action, the matter is immediately sent to the ARAs for ECEJ and OPRA for decision. If necessary, the ARAs will take the issue to the RA.

10. The compliance assistance letter will include: 1) a description of the type and nature of the assistance; 2) the time[s] compliance assistance will be offered/available; 3) a list and schedule of action[s] the tribe and facility need to take to achieve compliance; 4) a list of documentation the tribe and facility need to provide to EPA; 5) a date by which the Region will again assess the status of the facility's compliance, and (6) a statement that continuing non-compliance may result in the filing of a formal enforcement action including civil penalties.
11. A draft of the compliance assistance letter will be sent to the tribal government, including an offer to consult on its contents. OPRA will communicate with the Tribe at an appropriate level as a follow-up to the compliance assistance letter. After consultation (or, if no response, after two weeks), the final letter will be sent and compliance assistance provided.

ASSESSMENT OF COMPLIANCE ASSISTANCE AND DISCUSSION OF FURTHER COMPLIANCE ASSISTANCE OR ENFORCEMENT OPTIONS

12. EPA will communicate with the tribal government (Chairman or President and environmental director) as a follow-up to the compliance assistance provided.
13. If compliance assistance is provided as described in the letter, and compliance is still not achieved on the assessment date, then ECEJ or OPRA will inform each other immediately (no later than within one week) and schedule the issue for the next CSC (with OPRA and ORC) meeting (or the one after, if scheduling so requires).

⁸ TAP will coordinate with ECEJ (and, if applicable, the Water Program) on all communications with the tribal government regarding non-compliance and compliance assistance.

14. If ECEJ (or the Water Program) may propose formal enforcement action against the tribal facility, it will list in writing how the circumstances meet the three criteria set forth in the 1984 Indian policy. This list will be distributed to ECEJ, TAP and ORC at least one week prior to the case screening committee meeting and will include any attachments of referenced documents that are not already in the possession of ECEJ, TAP and ORC. Attachment D lists these criteria and some suggestions for factors to consider.
15. The CSC, OPRA and ORC will take into account any inspection, compliance, and compliance assistance history of the tribal facility, and discuss the merits of rendering further compliance assistance and/or taking formal enforcement action.

If the ECEJ and OPRA agree on the appropriateness of providing further compliance assistance, loop back to step 9, above. If ECEJ and OPRA disagree on whether to proceed with a formal enforcement action (an administrative or judicial complaint or order), the issue will be immediately sent to the ARAs for ECEJ and OPRA for decision. If necessary, the ARAs will take the issue to the RA.

PROPOSALS FOR FORMAL ENFORCEMENT ACTIONS

16. If ECEJ and OPRA agree to proceed with a specified administrative or judicial formal enforcement action, ECEJ will notify the RA of this decision, and ECEJ, OPRA, and ORC will discuss and agree on confidentiality rules for the case. If significant new information comes to light after the Regional decision to proceed with formal enforcement is made, but before the case is sent to the Office of Enforcement and Compliance Assurance (OECA) for concurrence, the CSC, OPRA and ORC will immediately reconvene to determine whether the decision should remain the same or be changed.
17. The case, including a description of how the three criteria of the 1984 Indian policy are met by the circumstances, will be sent to the AA for OECA for concurrence, in consultation with the American Indian Environmental Office (AIEO) and the Office of General Counsel (OGC). Proposed judicial cases will only be referred to the Department of Justice (DOJ) after OECA's concurrence. Referral documents will include positions and rationales held by Regional programs that disagreed with the Regional decision to refer the matter to OECA. Once the case is sent to the AA for OECA for review, it is the official Regional position and shall be supported by the whole Region. The Regional case team will develop a communications strategy for all internal and external parties that will reflect the principle that the Region will speak with one voice on the subject.
18. If significant new information comes to light after the Region has sent the proposed action to OECA, the information will be shared among ECEJ, OPRA, and ORC, and a meeting will be held if requested. The Region will then decide (elevating decisions as necessary to reach agreement) whether the information (a) warrants a change or withdrawal of the Regional request for concurrence, (b) must be forwarded to OECA (and DOJ if the action has been referred), and/or (c) need not be forwarded.
19. Once EPA (the Region and the AA for OECA) decides to proceed with a formal enforcement action, ECEJ will supplement the communication strategy for the action. It will specify appropriate times for and recipients of notification to the tribe (and others if appropriate),

including that the ARAs for ECEJ and OPRA (in consultation with DOJ if the decision was to refer the case) will notify the tribal chairperson or president of the pending action and potential penalties.

20. As a general rule, the tribally-owned or managed legal entity, but not the tribal government itself, will be named as the responsible party, and EPA will not pursue the tribal government as a signatory to a settlement agreement, or other legally binding document, nor will EPA include the tribe's financial resources in calculating the proposed penalties or in evaluating an ability to pay. If at any time the Region believes that it is necessary to bring the tribal government in as a signatory to a binding agreement or to consider the tribe's financial resources, the Region will outline and discuss the matter with OECA, AIEO, OGC (and any other relevant EPA program) and DOJ if the case has been referred.
21. Compliance is achieved, thus protecting human health and the environment in and around the facility.

Date

William P. Yellowtail
Regional Administrator
EPA Region 8

Attachment A

Sample Consultation Letter To Tribe (from step 4.c. of guidance)

As described in step 4.c. of the guidance, the following is a sample letter of consultation to the tribal government, seeking its input on a proposed enforcement response to violations at a private facility in Indian country. The letter should be tailored for the particular tribe, violations, EPA staff, and proposed EPA response.

CERTIFIED MAIL **RETURN RECEIPT REQUESTED**

Ref: 8 _____

_____, Chairman [or President or other title]

[EPA must verify the correct name and title per the “Tribal Contacts List” on the I drive]

[address]

Dear _____ [title & name]:

The purpose of this letter is to consult with you regarding a proposed enforcement action by the United States Environmental Protection Agency (EPA) against a non-tribally owned or operated facility located within the exterior boundaries of the _____ Reservation or otherwise within Indian country, as defined at 18 U.S.C. § 1151. Within the next few weeks [or other time frame], EPA Region 8 is planning to issue a [Proposed?] Administrative Order to _____ for alleged violations of the _____ Act and _____ regulations. The violations include _____ [provide a brief layman’s description]. The Order will compel the company to comply and will assess penalties. A copy of the Order will be sent to you as it is issued.

We encourage your input and sharing of additional information in this matter, including whether the Tribal government plans to address the non-compliance using Tribal authorities. As EPA plans to issue the Order by __ [date], please let us know if you have any questions or information that you wish us to consider prior to that date. Please do not hesitate to write or call me at (303) 312-_____, if you have any questions or concerns. If your staff has questions or information to share, the most knowledgeable people on these issues are _____, [technical title] at (303) 312-_____, and _____, Enforcement Attorney at (303) 312-_____. I appreciate your partnership with EPA as we work together to protect public health and the environment.

Sincerely,

Carol Rushin [or Kerrigan Clough]
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice.
[or Office of Partnership and Regulatory
Assistance]

cc: _____ [name & title of tribe's environmental program manager]
Sadie Hoskie, Director, Tribal Assistance Program, EPA, Region 8

bcc: _____ [Tribal Program Manager], TAP
_____[staff], Technical Enforcement Program
Connally Mears, TEP

Attachment B

Background and examples of compliance assistance and sample compliance assistance History (per step 5 of guidance)

As described in step 5 of the guidance, a compliance assistance history must be compiled prior to any discussion of EPA response to non-compliance at tribal facilities. Such a history may be contained in inspection reports or other existing documents, or created anew at this point. In any event, the history should account for all contacts among EPA, other government agencies, and the Tribe or facility, in a narrative, table or other usable format, with attachments of necessary documents. What follows is (1) a background and examples of compliance assistance, and (2) a sample of one acceptable format for a compliance assistance history.

A. Background and Examples of Compliance Assistance

Compliance assistance includes a wide array of EPA activities conducted once EPA becomes aware that a facility is not in compliance with federal environmental laws or in response to a request for technical assistance. Where a tribal government is involved, EPA's compliance assistance may include: technical assistance to the tribal government and facility; site visits; training; and providing verbal or written guidance on recommended steps to achieve compliance. With regard to guidance on achieving compliance, EPA should discuss with the tribal government and the facility, a range of specific actions the facility can take that may result in compliance with federal law. EPA does not have the responsibility to specify how compliance is achieved, but it offers expertise and information to tribes to assist them in their choices to come into compliance. The nature of the violation and a range of reasonable options for achieving compliance should be explained in sufficient detail for tribal officials and facility managers to evaluate. Moreover, EPA should explain in clear and understandable terms, what the potential environmental and health consequences are, and discuss potential statutory or regulatory penalty amounts that may be assessed.

Compliance assistance may include, but is not limited to: (Note: face to face communication is generally preferable to other means of communication)

- ☐ technical training, including training provided by the federal government to the facility, the tribal environmental department and/or the tribal leadership and/or other media specific technical assistance documents (TAD's), brochures, videos, training manuals, or any other technical training that might be recommended by EPA
- ☐ communication among EPA and the facility, the tribal environmental department and/or tribal leadership that clearly spells out specific actions that may help the facility to comply with federal law. First the problems at the facility need to be specifically identified, then EPA may suggest a range of options, including cost and contractor information, and any schedules for compliance assistance and/or compliance.

- ☐ any communication between EPA and the facility, the tribal environmental department and/or the tribal leadership that informs the facility of reasonable options for achieving compliance. (These need to be explained in clear and understandable terms and in sufficient detail for those involved to understand and evaluate).
- ☐ on-site demonstrations specifically designed to assist the facility in achieving compliance
- ☐ any compliance agreement that does not provide for penalties nor constitute a consent order, which provides the steps necessary to bring a facility into compliance
- ☐ examples of pertinent forms, standard operating procedures, or issued permits
- ☐ assistance with applications for permits that are necessary to bring the facility into compliance

2. Sample Compliance Assistance History

The example below is a sample of one acceptable format.

Compliance Assistance History

(Date of report)

(Author)

Facility Name:

Facility location:

Affected Tribe(s):

Present Facility Contact:

Present Tribal Contact:

History of Regulatory Contacts Regarding the ____ Facility (____ Tribe)			
DATE	EPA OR OTHER GOVERNMENTAL AGENCY (e.g., inspections, letters, calls, training, with name of staff involved, etc.)	FACILITY OR TRIBE EVENT (e.g., letters, calls, reports sent, with name of staff involved, etc.)	ATTACHMENT NUMBER AND/OR DESCRIPTION (e.g., report, phone log, etc.)
4/1/2000	Anonymous phone complaint (received by NAME).		1. Phone memo of that date.

History of Regulatory Contacts Regarding the ____ Facility (____ Tribe)			
4/15/	EPA inspection scheduling call (NAMES OF EPA STAFF ON CALL)	(NAME OF FACILITY STAFF ON CALL)	2. File log
4/21/	EPA inspection/sampling confirms 100 drums of cyanide, unmarked, open tops, etc. (NAME OF EPA INSPECTORS)	Participates in inspection (NAME OF FACILITY REP).	3. Inspection report, dated 5/10/2000
4/23/	Inspection report sent to Tribe and facility (NAME)		3.5. Cover letter.
4/26	EPA provides on-site technical assistance by [DESCRIBE OR ATTACH DESCRIPTION OF NATURE OF HELP (NAME)]	Name of staff present.	
4/28		Facility manager attends EPA-sponsored hazardous waste training.	
4/30		Call to EPA offering cleanup & asking advice	4. Notes of call; (NAME;47 pages).
5/2/	Conference call on cleanup (NAMES)	(NAME)	
5/15	EPA assists by monitoring cleanup and proper reporting requirements	[NAME]	
5/30		Tribe writes documenting removal of drums.(NAME)	5. Letter
6/10	Follow up inspection; soil contamination noted.(NAME)	Tribe joins.(NAME)	6. Report
ETC.	ETC.	ETC.	ETC.

Attachment C

Sample Information Letter to Tribe (from step 6 of the guidance)

As described in step 6 of the guidance, the following is a sample letter to accompany EPA's transmittal of documents regarding present and past compliance and related assistance activities at the facility.

Ref: 8_____

_____, Chairman [or President or other title]

[EPA must verify the correct name and title per the "Tribal Contacts List" on the I drive]

[address]

Dear _____ [title & name]:

As you may know, EPA Region 8 recently conducted an inspection of *(or, reviewed the _____ records or reports, or conducted a sanitary survey of)* (NAME OF SPECIFIC FACILITY), located at/near (NAME OF TOWN OR COUNTY) on the (NAME OF RESERVATION) or otherwise within Indian country as defined at 18 U.S.C. 1151. It is our understanding that this facility is owned, managed or controlled (PICK WHICHEVER APPLY) by the (NAME OF TRIBE). *(OR: EPA has determined that the Tribe's substantial interest in this facility warrants a specific enforcement response different from that of a private facility.)* EPA's work revealed violations of (NAME OF STATUTE) and *(if applicable)* the regulations promulgated pursuant to that law. The violations include (PROVIDE A SIMPLE, PLAIN ENGLISH SUMMARY OF THE VIOLATIONS NOTED). We have enclosed a copy of the inspection (OR OTHER) report, which more specifically describes the violations, and a compliance assistance history, which describes EPA's past efforts to assist the facility to achieve compliance. We have included an extra copy of these materials, to share with your attorney or whomever else you may wish.

Please do not hesitate to write or call me at (303) 312-(ARA PHONE NO.) if you have any questions about EPA's process for dealing with non-compliance at the above facility. If your staff has questions about the inspection (OR OTHER) report, compliance assistance summary, or any other matter, the most knowledgeable person on my staff is _____, who can be reached at (303) 312- .

Sincerely,

[Carol Rushin or Kerrigan Clough],
Assistant Regional Administrator
Office of _____

Enclosures (2 copies)

cc: Environmental Director (OR EQUIVALENT FOR SPECIFIC TRIBE)
Facility Manager

Attachment D

Indian Policy Criteria for Formal EPA Enforcement Actions at Tribal Facilities (per step 14 of the guidance)

EPA's national policy sets forth three factors for EPA to consider prior to taking a formal enforcement action at a tribal facility. In step 14 of the guidance, the proponent of taking enforcement action explains how the specific factual circumstances meet the three criteria. This will be done by reviewing the compliance and compliance assistance history of the facility. The three criteria are listed below, along with some possible applicable facts, to be considered in preparing such a document. **(SUCH DOCUMENTS SHOULD BE MARKED "CONFIDENTIAL AND PREDECISIONAL")**.

- (1) A significant threat to human health or the environment exists (the analysis may include discussion of the following and/or other factors):

- the current status of compliance or non-compliance for each count proposed;
- the duration and gravity of the ongoing and past violations, including times when the facility was in compliance;
- likelihood that violations may continue or recur (including whether the facility has applied technological, staffing, and/or other solutions to remedy the problem);
- the nature and extent of the threat to human health or the environment for each count proposed and for the non-compliance as a whole.

In light of the above, does a significant threat to human health or the environment exist?

- (2) Such action would reasonably be expected to achieve effective results in a timely manner (the analysis may include discussion of the following factors):

- the success or failure the facility has had recently in achieving and maintaining compliance;
- information on the likely reason(s) for the non-compliance (technical capability, management turn-over, lack of financial or personnel resources, neglect; etc.);

In light of the above, can EPA reasonably expect to achieve effective results in a timely manner?

- (3) The federal government cannot utilize other alternatives to correct the problem in a timely fashion (the analysis may include discussion of the following factors):

- EPA's or the Tribe's efforts to work with other federal agencies to assist the facility in achieving compliance,
- compliance assistance (updated to present) which includes all contacts with the facility or Tribe (see attachment B), or a narrative description and analysis of such

- compliance assistance;
- the response of other federal agencies to the facility's non-compliance;
- if a judicial referral, describe why administrative action (with or without penalties) may be insufficient to correct the problem.

In light of the above, could the Federal government use other alternatives to correct the problem in a timely fashion?